



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-87-17

FACTS:

The Water Resources Management Advisory Committee (Committee) of the Department of Environmental Quality Engineering (DEQE) was established as a mandatory committee by St. 1985 c. 592 (the Act) to review the development of standards, rules and regulations for water resources management and to recommend methods by which existing water management practices and the laws regulating them may be supplemented and improved and their administration financed. Included in this general power is the authority to review and make recommendations concerning the adoption or amendment of regulations establishing procedures and forms for filing notifications and registration statements. The Committee may also adopt, review and amend: regulations establishing criteria, standards and procedures for issuing permits; requirements for the content and form of permit applications; reasonable permit application fees, and requirements for monitoring inspection and reporting of water withdrawals and usage by permitted water users. The Act requires that these regulations be developed in two phases within certain time frames: first, the regulations establishing a water withdrawal registration system, and second, the regulations establishing a permit system for withdrawals of water.

DEQE must consult with the Committee before it adopts such regulations. The requirement of registration statements or permit applications will not commence until initial regulations are established, and the Committee will continue to review the development and may make recommendations concerning supplementation or amendment. Under St. 1985 c. 592, a representative of each of eleven different organizations or constituencies serves on the Committee. Committee members are appointed by the Governor and serve without compensation. Members are representatives of the following organizations: Associated Industries of Massachusetts, the Massachusetts Municipal Association, the water works industry, an agricultural association, a consumer organization, a water well drill association, an environmental organization, a regional planning agency, and two representatives knowledgeable in water management affairs. Mr. X was chosen as the member knowledgeable in water management. He is a partner in a consulting engineering firm and he anticipates the possible receipt of compensation regarding registrations or permit applications on behalf of clients. Another potential appointee is Mr. Y who would represent the water works industry; Mr. Y is the superintendent of the ABC Board. He anticipates filing registrations and permit applications which would be required by the regulations drafted by DEQE. There is no requirement in the Act which would mandate the water works industry representative be employed by a water system operator. The Committee is

given explicit authority to consult regarding the enforcement of the Act and the regulations adopted thereunder.

By policy of the Commissioner, dated May 11, 1987, excluded from the Committee's role is advice on specific, individual cases, whether such cases involve permit or enforcement issues or both. Committee members are prohibited from reviewing specific permit applications at any time while those applications are pending, and from advising the DEQE regarding the modification, supplementation or revocation of a specific permit. Committee members are also prohibited from advising the DEQE on specific enforcement decisions about compliance with a particular regulation. Individual permit or enforcement decisions are intended by the Commissioner's policy to be outside the scope of the Committee's official responsibility.

QUESTIONS:

1. Are the members of the Committee "state employees" within the meaning of G.L. c. 268A, s.1(q)?
2. Does G.L. c. 268A permit Committee members to file with DEQE registration statements or permit applications on behalf of their organizations?

ANSWERS:

1. Yes.
2. Yes, provided the Commissioner's policy dated May 11, 1987 remains in full force and effect.

DISCUSSION:

1. Jurisdiction

In EC-COI-86-4, the Commission concluded that members of the Administrative Penalties Advisory Committee (Committee) of DEQE are state employees within the meaning of the conflict law. The analysis herein is essentially the same as in that opinion. In both cases, the Committees are mandatory and permanent components to the implementation of a state statute, as opposed to temporary advisory committees which the Commission has regarded in other cases as exempt from the definition of state agency. In both cases, the functions of the Committees appear to be permanent and ongoing, and include a review of the development of regulations on a continuing basis.

A critical factor in finding jurisdiction is that the Committee is performing essentially governmental functions by assisting in the work product of the state agency. The Act envisions regulation formulation, if not actual drafting, to begin at the Committee level. Thus, the Committee is contemplated as a working committee with a substantive role in

the regulation process, and not simply as a sounding board for constituent groups. Agency regulation drafting is a governmental function customarily performed by governmental employees. Therefore, the Commission concludes that members of the Committee are state employees within the meaning of G.L. c. 268A, s.1 et. seq., and, as a result, subject to the restrictions set forth therein. In view of their unpaid status, Committee members are "special state employees" which means that certain provisions of G.L. c. 268A apply less restrictively to them.

2. Application of G.L. c. 268A

Four potential Committee members have asked whether, as special state employees, they may appear before DEQE to file registration statements or permit applications on behalf of their organizations or clients while they are serving on the Committee. The section of the conflict law directly applicable to the members' question is s.4. Section 4, as applied to the facts, prohibits a special state employee from receiving compensation from, or acting as an agent for, an organization or anyone other than the state in relation to any particular matter in which the state is a party or has a direct and substantial interest, and which is or has been a subject of his "official responsibility"[1] as a state employee. The state is a party to or has a direct and substantial interest in any registration filing or permit application with DEQE. A registration filing or permit application is a particular matter.[2] The only issue remaining is whether a registration filing or permit application is a subject of a Committee member's official responsibility.

The keynote of official responsibility is the "potentiality" of directing agency action and not the actual exercise of power.[3] Specific registrations and withdrawal permits would be a subject of potential action by committee members if the Committee had the ability to review a specific user or source and recommend that DEQE amend, supplement, or revoke a registration or withdraw a permit, recommend agency action regarding enforcement, or participate in the monitoring or inspecting of a specific user or water source. In this case, withdrawal permits would be "a subject of" the Committee's work, even if Committee members themselves do not have the final authority for judging the merits of a specific permit or application request or the final say as to an enforcement decision.

The Committee has the authority to review the development of the regulations and to make recommendations concerning supplementation or amendment. The restriction in s.4 depends on how DEQE interprets the Committee's authority to "review" permit applications or filings. The Act envisions that a withdrawal permit, issued in accordance with the regulations establishing the criteria and standards for obtaining permits, is the beginning, not the end of a process.[4] A permit may be modified, suspended or revoked as may be necessary to carry out the general purposes of the Act.

Compliance with the terms of the permit may be enforced by additional orders, civil penalties or injunctive relief. The Committee is given explicit authority to consult regarding the enforcement of the Act and the regulations adopted thereunder. This authority, however, by policy of the Commissioner, does not include the authority to

consult regarding review of a specific case to determine enforcement needs or requirements or to consult regarding the monitoring, inspecting and reporting requirements of a specific user or water source during the period of a withdrawal permit as part of DEQE's enforcement obligation. There are explicit procedural rules, in writing, which prohibit all Committee members from reviewing specific permit applications at any time while they were pending and, prohibit Committee members from consulting regarding the modification, supplementation or revocation of a specific permit and further from consulting regarding enforcement decisions relating to compliance with the terms of a specific permit, or user, or service. Therefore, the Commission concludes that individual permit applications are not a "subject" of the Committee's work. So long as the Commissioner's interpretation of the Act and his policy remain in force, Committee members may submit registrations or applications to DEQE.

[1] "Official responsibility," means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

[2] "Particular matters," means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns counties and districts for special laws related to their governmental organiaations, powers, duties, finances and property. G.L. c. 268A, s.1(k).

[3] Buss, The Conflict of Interest Statute: An Analysis, Boston University Law Review, Vol 45, 299, at 321.

[4] A permit is thus unlike a judgment, decision and order, or a court case; there is no final action since a permit is always subject to the continuing regulatory authority of DEQE. Thus, a permit may have conditions X, Y, and Z. A subsequent regulation may require conditions A, B, and C. If the permit holder does not comply with condition A the permit may be suspended or terminated even though the terms X,Y, and Z have been complied with. The only vested property right in a permit is the right to a hearing. see s.11(7).